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Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rulemaking to Amend Parts 1, 2, 21, and 25	)	CC Docket. No. 92-297
of the Commission's Rules to Redesignate	)	
the 27.5-29.5 GHz Frequency Band, to	)	
Reallocate the 29.5-30.0 GHz Frequency Band,	)	
to Establish Rules and Policies for Local	)	
Multipoint Distribution Service and for	)	
Fixed Satellite Services	)	

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REPLY COMMENTS OF WEBCEL COMMUNICATIONS, INC.

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SUMMARY

The Commission's proposal to allocate "an unprecedented amount of spectrum" for LMDS promises to revolutionize wireless telecommunications, offering for the first time an interactive, two-way, broadband substitute for local telephone and cable services. This vision, which perfectly complements the "key objective" of the landmark Telecommunications Act of 1996—to foster facilities-based competition for LECs and cable systems—requires measures to ensure that incumbent monopolists do not act on their clear financial and strategic objectives to "preempt" competition by anticompetitive foreclosure of LMDS entry in the auction process.

This comment round provided yet another opportunity for LECs and cable MSOs to demonstrate that their eligibility for LMDS licenses would not be used to delay or thwart the technological potential for full broadband competition. Challenged to come forward with evidence of efficiencies or economies that could benefit consumers, these incumbent monopolists have responded instead with rhetoric. The *Fourth Notice* repeatedly invited LECs and cable operators to show why their entry into LMDS would realize economic benefits offsetting the plain anticompetitive incentive to stifle LMDS development as a truly competitive service. *Like "Casey at the Bat," these mighty players have once again struck out.*

The LEC and cable system arguments that open auction eligibility will somehow yield *greater competition* in the LMDS market are self-serving and wrong; so long as they retain local market power, these firms have substantial anticompetitive incentives, not shared by others, to limit or retard the use of LMDS as a threat to their own monopoly revenues. They myopically claim that preemptive purchase of LMDS is an "unrealistic scenario," purportedly because they face so much present competition that they do not have the financial means to buy LMDS spec-

trum and "warehouse" the resource. Of course, if this were the case, there would have been no need for the 1996 Act's many provisions designed to spur competition for both local telephone and multichannel video services, because these markets would already have been deemed effectively competitive. That plainly is not the present reality of local telephone and cable markets, where monopoly rules and in which competition is nascent, embryonic and extremely fragile.

The parallels that the incumbent monopolists try and draw are just not there. The LECs suggest that the Commission's rejection of eligibility limitations for DBS and PCS implement a settled policy of "open eligibility." But, just weeks ago the Commission reaffirmed the importance of cellular-PCS cross-ownership restrictions, articulating the very competitive and economic principles that WebCel and others have urged for this proceeding. The 1996 Act's treatment of MMDS and telco-cable acquisitions confirms that *temporary* and *geographically limited* restrictions designed to accelerate the transition from monopoly to competition are fully consistent with the Act's policy of spurring local telephone and cable competition. The claim that LMDS restrictions would somehow violate the 1996 Act cannot be taken seriously.

The opening comments raise several issues related to the scope and duration of LMDS eligibility restrictions and the appropriate band plan for LMDS service. WebCel believes that the Commission should resolve these issues in a way that maximizes the potential for LMDS to serve as a broadband substitute for local telephone and cable services:

- *Eligibility restrictions should not apply to LECs and cable systems in BTAs where they are not the incumbent providers.*

- *A separate exemption for rural telephone companies is not needed* in order to allow them to use LMDS to expand telephone service beyond their franchise territories.

- While WebCel agrees that the "effective competition" and "competitive checklist" standards of the 1996 Act are not coextensive with actual, facilities-based competition, *we do not recommend that the Commission fashion its own, antitrust-based standard for determining expiration of an LMDS eligibility ban.*

- WebCel strongly supports *combining all LMDS spectrum blocks, including the new and critical 300 MHz upstream block that the Fourth Notice proposes in the 31 GHz band, in a single auction license,* in order to ensure sufficient spectrum to provide interactive, broadband services

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Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services	)	CC Docket. No. 92-297

REPLY COMMENTS OF WEBCEL COMMUNICATIONS, INC.

WebCel Communications, Inc. ("WebCel") by its attorney, hereby submits these reply comments on eligibility rules and related issues for Local Multipoint Distribution Service ("LMDS") in response to the Fourth Notice of Proposed Rulemaking ("Fourth Notice") in the above-captioned proceeding.[1]

INTRODUCTION

The *Fourth Notice's* request for comment on local exchange carrier ("LEC") and cable system operator eligibility to participate in the LMDS auctions, in those BTAs where they are the incumbent monopoly providers, has generated a substantial record. Yet what is missing from this record is almost as important as what was contained in the opening comments. Despite the

[1] *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services,* First Report and Order and Fourth Notice of Proposed Rulemaking, ¶¶ 105-36, CC Docket No. 92-297 (released July 22, 1996)("Fourth Notice").

Commission's second formal invitation for proof of efficiencies that monopoly LECs and cable systems might offer in LMDS,[2] once again none of them has come forward with a suggestion—let alone economic evidence—of economies of scope or scale in this new service. In contrast, the comments broadly support the view that these incumbents have the clear incentive and opportunity to acquire LMDS licenses as a means of eliminating, or delaying, facilities-based local video and telephony competition.[3]

Instead of empirical economic evidence, the LECs and cable multiple system operators ("MSOs") have offered rhetoric. Their protestations that a transitional, geographically limited LMDS restriction would contravene the Telecommunications Act of 1996 or be inconsistent with past Commission policies are red herrings. The 1996 Act is fully consistent with the imposition of LMDS restrictions, and the Commission's "open entry" policy in other spectrum auctions should not extend to LMDS, "a potential full-service substitute for local exchange and cable services."[4] The Commission has the opportunity to make LMDS just such a truly competitive service, with a new generation of entrants, or relegate it to second-tier status as a tangential "side order" nominally offered by cable systems and LECs in a duopoly market. The LEC and cable system arguments that open auction eligibility will somehow yield *greater competition* in the LMDS market are self-serving and wrong; so long as they retain local market power, these firms

[2] *Fourth Notice* ¶¶ 125, 127-28.

[3] Allied Communications Comments at 3; CPI Comments at 2, 6-8; CT&T Comments at 2-3; CellularVision USA Comments at 12-13; Comtech Comments at 8-10; MCI Comments at 1, 6; RioVision Comments at 3; SkyOptics Comments at 1, 3-6.

[4] Ad Hoc Rural Telecommunications Group ("AHRTG") Comments at 2.

have substantial anticompetitive incentives, not shared by others, to limit or retard the use of LMDS as a threat to their own monopoly revenues.

The comments raise several significant issues regarding implementation of both eligibility restrictions and an LMDS band plan. WebCel believes that:

- *Eligibility restrictions should not apply to LECs and cable systems in BTAs where they are not the incumbent providers.* Although we share concerns raised by some commenters regarding horizontal collusion, the economic basis for cross-ownership restrictions arises from monopoly status, not mere size.

- *A separate exemption for rural telephone companies is not needed* in order to allow them to use LMDS to expand telephone service beyond their franchise territories. Under the *Fourth Notice's* 20% rule for determining an "incumbent," most rural LECs, whose franchise areas are smaller than BTAs, would not be prohibited from participating in the LMDS auctions.

- While WebCel agrees that the "effective competition" and "competitive checklist" standards of the 1996 Act are not coextensive with actual, facilities-based competition, *we do not recommend that the Commission fashion its own, antitrust-based standard for determining expiration of an LMDS eligibility ban.* Our proposal to use these surrogates is intended to create an easily applied, clearly identifiable test for expiration, a benefit that we feel outweighs its analytical deficiencies.

- WebCel strongly supports *combining all LMDS spectrum blocks, including the new and critical 300 MHz upstream block that the Fourth Notice proposes in the 31 GHz band, in a single auction license,* in order to ensure sufficient spectrum to provide interactive, broadband services. Disaggregation should be permitted, but multiple spectrum blocks should not be auctioned separately.

DISCUSSION

The central issue relevant to LMDS eligibility is whether incumbent monopoly LECs and cable operators could realize special efficiencies in the provision of this new service. The *Fourth Notice* asked for comment—in terms almost identical to 1995's *Third Notice*—on whether incumbent LECs or cable operators have "any economies of scope, or other efficiencies," or "any

other advantages" in the provision of LMDS service.[5] *Fourth Notice* ¶¶ 126, 127. Remarkably, yet again not a single LEC or cable interest has demonstrated that such economies exist, and neither the RBOCs nor NCTA even attempt to argue that an eligibility ban would prevent incumbents from realizing cost-reducing efficiencies that would benefit consumers. The Commission's concern that restricting eligibility would "prevent some potential bidders from realizing efficiencies of scale and scope" is completely unsubstantiated. *Id.* ¶ 125.

I. THE RECORD DEMONSTRATES CONCLUSIVELY THAT INCUMBENT LECs AND MSOs HAVE SUBSTANTIAL ANTICOMPETITIVE BIDDING INCENTIVES NOT OFFSET BY ANY HYPOTHETICAL EFFICIENCIES IN PROVISION OF LMDS

The opening comments demonstrate without doubt that incumbent LECs and cable systems have substantial anticompetitive incentives in LMDS that are not counterbalanced by any possible economic efficiencies. Commenters ranging from public interest groups (*e.g.*, CPI Comments at 10-11) to diversified communications providers (*e.g.*, MCI Comments at 3) agree that economies of scope between LMDS and cable or telephone service are "minimal" or completely nonexistent.[6] The simple fact is that, as a broadband, wireless service—provisioned by equipment vendors with a turn-key, stand-alone network "infrastructure"[7]—LMDS shares little if

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[5] *See Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services,* Third Notice of Proposed Rulemaking and Supplemental Tentative Decision, ¶¶ 97-108, CC Docket No. 92-297 (released July 28, 1995)("Third Notice").

[6] As CPI pointed out, moreover, "any potential efficiencies of using telephone company plant and operating an LMDS network is already being addressed through the unbundling and resale provisions" of the 1996 Act. CPI Comments at 10-11; *accord, The Economics of Bidding for Scarce Resources: The Lessons of Monopoly Preemption as Applied to FCC Auctions of LMDS Licenses,* Kenneth C. Baseman, MiCRA, August 12, 1996, at 6-7 ("Baseman Report")(Attachment 1 to WebCel Comments).

[7] Texas Instruments Comments at 2; Hewlett-Packard Comments at 1.

nothing in common with wireline twisted-pair telephone networks and coaxial cable systems, eliminating any plausible efficiencies. WebCel Comments at 16, 21.[8]

The *Fourth Notice* represents the third opportunity the Commission has given LECs and cable systems in this proceeding, in now as many years, to demonstrate the existence of economies of scale or scope. *See* WebCel Comments at 1-2. They failed to do so before, and have failed once again. For instance, despite its cavalier suggestion that LECs "have the efficiencies of scale and scope and the necessary expertise, capital, existing infrastructure and experience to promote the early development of LMDS,"[9] US West offers neither analysis nor evidence in support of its rhetoric. None of its brethren have filled this void, either. To the contrary, all paid lip service to the proposition that incumbents have "advantages" of size and capital market experience, *see* BellSouth Comments at 3, while never acknowledging that these purported advantages are purely ephemeral. "[I]ncumbents have no more experience with either LMDS or broadband wireless services in general than other potential entrants, and the size of potential entrants is irrelevant to the success of their entry."[10] As MCI observed (MCI Comments at 5-6):

> [W]hatever advantages the RBOCs do have as providers of wireline local exchange services have been shown not to exist to other contexts. For instance, RBOCs have been claiming since 1984 that repeal of the MFJ's information services ban would allow them to compete vigorously in the enhanced services marketplace, but despite the elimination of that prohibition by the courts in 1990, RBOCs have yet to successfully launch any significant on-line or other information services.

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[8] "In fact, because LMDS is a wireless service that will not share infrastructure with existing LEC and MSO networks, there is no economic basis for the achievement of any appreciable efficiencies or economies of scope for the joint provision of wired telephony or video services and LMDS." MCI Comments at 5.

[9] US West Comments at 3.

[10] MCI Comments at 5.

Without any evidence of efficiencies, the LEC and cable interests are forced to contend generally that they do not have an incentive to use LMDS to thwart competition. This is myopic and wrong. As WebCel demonstrated in the economic analysis submitted with is comments, "[i]ncumbent monopolists place an anticompetitive valuation on LMDS licenses" and bidding eligibility restrictions improve consumer welfare by "provid[ing] social benefits without imposing social costs."[11] As CPI explained, incumbent LECs and cable systems have a clear incentive to "retard the provision of certain services in order to protect its existing network investments" (CPI Comments at 2) because of the revenue loss associated with migration from traditional monopoly services to LMDS. Thus, the incentives of incumbents to fully exploit LMDS services "will be less than the incentives *of any other entity that could own the license.*" *Id.* at 7 (emphasis supplied).[12]

This anticompetitive incentive is particularly inconsistent with the public interest given the short-run congressional imperative of opening local telephone and video markets to effective competition. Over the near term, there is little likelihood of new, wireline-based competition for LECs or cable systems due to the tremendous costs and long construction intervals required for completion of facilities-based local networks. MCI Comments at 3; WebCel Comments at 7-8. Consequently, because LMDS is a low-cost, broadband service capable of rapid deployment, incumbent LECs and cable MSOs will find it economically rational, and profitable, to "preempt" competitive LMDS service in their monopoly franchise territories by bidding above-market

[11] Baseman Report at 1.

[12] WebCel agrees with SkyOptics that incumbent LECs and MSOs share incentives for horizontal collusion, because each would view aggressive competition with similar services out-of-region as a zero-sum game. SkyOptics Comments at 7-8.

prices for LMDS spectrum based not on the inherent value of the spectrum, but rather its opportunity cost in potential lost monopoly rents. MCI Comments at 6; Baseman Report at 3. As WebCel summarized, "it is a rational business strategy for incumbent monopolists to apply future monopoly rents to outbid potential entrants for scarce alternatives, because such 'partial preemption' of competitive entry is 'always profitable.'" WebCel Comments at 7.

The LEC and cable interests have no real rejoinder to these settled economic principles. First, they claim that they "cannot use LMDS to inhibit competition" (USTA Comments at 4), without addressing the fact that, *alone among potential LMDS auction participants,* they are in the unique position to bid supracompetitive prices for LMDS licenses. Second, they claim that preemptive purchase of LMDS is an "unrealistic scenario" (NCTA Comments at 3), purportedly because they face so much present competition that they do not have the financial means to buy LMDS spectrum and "warehouse" the resource. Of course, if this were the case, there would have been no need for the 1996 Act's many provisions designed to spur competition for both local telephone and multichannel video services, because these markets would already have been deemed effectively competitive.

That plainly is not the present reality of local telephone and cable markets, in which competition is nascent, embryonic and extremely fragile. Moreover, NCTA's contention that it would be impossible for incumbents to purchase LMDS licenses only to let the spectrum "lie fallow" proves too much. As WebCel has pointed out throughout its participation in this proceeding, an incumbent LEC or cable operator can effectively "warehouse" LMDS spectrum by putting it to a secondary or "complementary" use, rather than as a form of direct competition with its huge, core monopoly services, just as easily as by leaving the license unused. *E.g.,*

WebCel Comments at 23.[13] Contrary to some incumbent suggestions (*e.g.*, AHRTG Comments at 3), "build out" requirements are no safeguard against this form of warehousing because they can dictate only when a network is constructed, not how it is to be used. MCI Comments at 7 n.7; CPI Comments at 12; ComTech Comments at 9. By the same token, arguments that incumbents cannot warehouse LMDS spectrum because of the need "to develop services that could earn a solid return on capital [for] auction bidding and construction" (NCTA Comments at 5) ignore economic realities. As CPI emphasized, for incumbents the business incentives are skewed, because as monopolists—and alone among all LMDS bidders—they must "balance the additional revenues from acquiring LMDS subscribers with the potential loss of revenue from [their] existing services." CPI Comments at 6.

Stripped of these strawman arguments, the incumbents are reduced to claiming that there is "no basis to distinguish" LMDS from other wireless services. Bell Atlantic/SBC Comments at 6, 8 n.12. The facts are otherwise. LMDS is a complete "infrastructure" or "platform" that can provide broadband voice, video and data services. *See* Texas Instruments Comments at 2, 4; Hewlett-Packard Comments at 3, 5; MCI Comments at 4; WebCel Comments at 18, 20-21. Contrary to NCTA's suggestion (NCTA Comments at 4 & n.5), the large 1.3 GHz spectrum allocation for LMDS is a key reason why this new service provides unique opportunities for direct, facilities-based competition for telephony and cable services. Compared to the 30 MHz allocated to PCS licenses, for instance, LMDS can offer an unprecedented degree of spectrum reuse, and thus throughput, with unparalleled flexibility for licensees in the mix of services

[13] "[I]n the hands of these providers, LMDS would be at most merely a 'niche' technology used as an ad hoc supplement or filler to the LEC's or cable operator's wire-based infrastructures." CT&T Comments at 3.

provided. Perhaps the clearest verification of the unique capabilities of LMDS comes from the rural telephone company interests. Eager to use LMDS to extend their telephone services beyond current franchise areas, the rural telcos proudly boast that LMDS is "a potential full-service substitute for local exchange and cable services."[14] Not even the most fervent advocate of PCS can claim that PCS services will ever be a *substitute* for local exchange telephony.

II. NEITHER THE 1996 ACT NOR PRIOR COMMISSION AUCTION ELIGIBILITY DECISIONS COMPELS AN "OPEN ELIGIBILITY" RULE FOR LMDS

Substituting pejoratives for analysis, the RBOCs are especially vocal in their complaints that LMDS eligibility restrictions would be an "arbitrary market allocation" based on "threadbare arguments" and "opportunistic maneuvering." Ameritech Comments at 1-2. To the contrary, it is the RBOCs and other incumbents who are seeking to use the Commission's processes to build a higher wall and dig a deeper moat around their monopoly franchises. Auction policy is used as a stalking horse to disguise their incentives to preclude the threat of real competition from independent, unaffiliated LMDS licensees.[15] If their failure to produce a scintilla of evidence of efficiencies were not revealing enough, the RBOCs and other incumbents present meritless arguments that eligibility restrictions would contravene the Telecommunications Act of 1996 and prior Commission auction decisions.

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[14] AHRTG Comments at 2.

[15] The RBOCs seek to portray parties supporting eligibility restrictions as "protectionist," but fail to acknowledge that in any BTA, six RBOCs, plus all but one LEC and cable operator, as well as IXCs, CAPs, satellite and PCS providers and others, will all be eligible to compete at auction. To suggest that barring incumbent monopolists is anticompetitive ignores the fact that the only place where LECs or cable operators would be precluded from bidding is where they have the unique incentive to distort the competitive fairness of the auction process by bidding away monopoly rents to secure their franchise against a direct competitive threat.

The parallels they try and draw are just not there. For instance, Bell Atlantic/SBC, Ameritech and USTA all suggest that the Commission's rejection of eligibility limitations for DBS and PCS implement a settled policy of "open eligibility."[16] But, just weeks ago—and after reversal by the Court of Appeals—the Commission reaffirmed the importance of cellular-PCS cross-ownership restrictions, articulating the very competitive and economic principles that WebCel and others have urged for this proceeding.[17] Furthermore, there is nothing in common between DBS, PCS and LMDS. Unlike PCS, LMDS is broadband and stationary, offering a means of direct competition with local telephony rather than ancillary mobile applications. Since PCS is not a substitute for local exchange service, it is far more relevant that the Commission has imposed eligibility limitations on cellular carriers, for whom PCS is directly competitive, than that the Commission declined to do so for LECs, for whom PCS is not. By the same token, DBS is a nationwide, generally full-CONUS application, not a geographically delimited license like LMDS. If NCTA's complaint of insufficient financial resources has any validity, it is in the context of $800 million nationwide DBS licenses, not smaller—and far cheaper—LMDS licenses covering only an MSO's own monopoly territory.

One key difference between all of these "other" services and LMDS, moreover, is that the Commission has determined to license only a single LMDS provider in each BTA in order to create an interactive, broadband wireless product. That is excellent from a service perspective because it avoids potential Balkanization of LMDS by auctioning bits and pieces of spectrum

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[16] Ameritech Comments at 4; BA/SBC Comments at 3-6; USTA Comments at 2-3.

[17] WebCel Comments at 13-14, *citing Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap,* WT Docket No. 96-59, FCC 96-278, ¶ 99, 111, 113 (released June 24, 1996)("Cellular-PCS Order").

and ensures vibrant, high-bandwidth applications for future generations. The existence of a single LMDS licensee in each service area, however, invalidates comparisons with wireless and satellite services where the Commission has previously rejected cross-ownership restrictions. In each of these, as CPI notes, consumers would have "other competitive sources" of the service to choose from, while a LEC or cable operator that acquires an LMDS license "will not face competitive forces from other LMDS providers in that market."[18] CPI Comments at 10. As the *Fourth Notice* expressly recognized, because the "proposed rules contemplate only a single LMDS licensee in each service area . . . [i]t therefore is appropriate to consider measures to ensure that the unprecedented amount of spectrum assigned to each LMDS licensee will be used to enhance the competitive provision of services in these highly concentrated markets." *Fourth Notice* ¶ 106.

The claim that LMDS restrictions would violate the 1996 Act cannot be taken seriously. First, the Act's preamble reference to a "pro-competitive, deregulatory" policy for telecommunications (BellSouth Comments at 3; Ameritech Comments at 3) does nothing to indicate that Congress wanted to permit incumbent monopolists to control new forms of facilities-based competition. To the contrary, in at least three ways the 1996 Act directly supports a policy of

[18] Licensing multiple LMDS providers in each BTA would attenuate the anticompetitive risks underlying proposed LMDS restrictions on incumbent LECs and cable operators. On the other hand, breaking the 1.3 GHz allocation into numerous separate licenses would destroy the interactive, broadband potential of LMDS, undermining a key objective in the creation of this unique new service. Only if the Commission were to simultaneously auction at least three licenses of 1 Ghz or more each would it be appropriate to consider whether the existence of other LMDS providers made LEC and cable operator cross-ownership restrictions unnecessary. Given the exceedingly long gestation period for the FCC's band plan in LMDS, it would make no sense to further delay the LMDS auctions to explore this remote possibility.

encouraging the emergence of facilities-based direct competition for both telephony and cable services:

- Section 271 of the Act links entry of the RBOCs into interLATA services, upon completion of the so-called "competitive checklist," to the presence of an actual, facilities-based competitor.

- Section 202(I) of the Act modifies (and retains) the cable-MMDS cross-ownership ban of the 1992 Cable Act by mandating its expiration when a cable system is deemed subject to "effective competition" under the 1996 Act's new standards.

- Section 652 of the Act precludes either LECs or cable systems from acquiring more than a 10% interest in each other, within their monopoly territories, in order to ensure that elimination of the telco-cable cross-ownership prohibition is not used as the basis for a "buy, not build" approach to competition between the two.

This is not at all a close question. Congress clearly desired to promote effective, facilities-based competition in the local exchange and cable services marketplaces. *Fourth Notice* ¶ 105. The 1996 Act's treatment of MMDS and telco-cable acquisitions confirms that *temporary* restrictions designed to accelerate the transition from monopoly to competition—by preventing the monopolist from controlling its direct competitors—are fully consistent with this policy. WebCel Comments at 12-14. To argue, as does US West, that because Congress did not affirmatively include an LMDS restriction it therefore precluded the FCC from adopting one (US West Comments at 6), is sophistry. As CPI notes, in comments drafted by a former senior member of the Senate-House Conference Committee staff, "[i]t is also clear that Congress did not intend to place a limit on the FCC's authority to take further action to enhance competition." CPI Comments at 3. Indeed, the converse of US West's claim is far closer to the truth. Where Congress wanted to constrain the FCC's ability to go beyond the Act—as in the "competitive check-

list" itself—the 1996 Act says so quite precisely.[19] Consequently, the most logical inference from the fact that "Congress did not consider restrictions on the eligibility of incumbents for LMDS" (*id.* at 8) is that the 1996 Act's retention of broad FCC "public interest" authority gives the Commission the power to fashion rules, consistent with the Act, necessary to carry out its purposes in new circumstances.

LMDS eligibility restrictions are thus fully permissible, indeed desirable, under the 1996 Act. The RBOCs argue that a snippet from the Conference Report—stating that LECs should be allowed to provide cable service "by any means"—compels the conclusion that Congress has already decided the eligibility issue.[20] But that cannot be true, because LEC provision of video services is permitted outside of their monopoly territories. In those circumstances, where LEC use of LMDS would not be barred by the proposed cross-ownership restriction, they would in fact have the ability to offer cable service "by any means." More importantly, however, had Congress wanted to preclude LMDS eligibility restrictions, or to limit the Commission's public interest power to determine auction eligibility, it could have done so directly. With nothing in the Act preventing eligibility rules, and because such restrictions would faithfully implement the Act's purpose of facilitating direct competition for LEC and cable services, WebCel submits that the propriety of eligibility limitations is a straightforward, uncontroversial issue.

The RBOCs' veiled reference to the 6th Circuit's reversal of the Commission's initial PCS Order (US West Comments at 4) is not germane. The record in this proceeding provides the

[19] Section 271(d)(4) of the Act provides that the FCC "may not, by rule or otherwise, limit or extend" the competitive checklist.

[20] BellSouth Comments at 3; BA/SBC Comments at 7.

clear economic basis for the proposed restrictions that the Court of Appeals found lacking in the PCS proceeding. Nor are the LEC claims that they can use LMDS to provide competition with cable systems particularly relevant under the 1996 Act. *E.g.*, USTA Comments at 4. Duopoly is not effective competition, as the unfortunate experience in cellular radio has proven. CPI Comments at 5-6; MCI Comments at 7-8. Furthermore, LECs already have in place their existing twisted-pair networks (MCI Comments at 6), ample fiber optic facilities (ComTech Comments at 12) and MMDS spectrum (Bell Atlantic/SBC Comments at 12), all of which can be used to provide video services. WebCel agrees with MCI that the policies of the 1996 Act are best implemented by requiring LECs to make good on their repeated promises to extend their existing facilities to provide direct competition for cable systems before allowing them to take control of yet another valuable piece of spectrum—and one that, not incidentally, for the first time offers a real possibility that wireless service can be a true "substitute" for local exchange telephone services. *See* MCI Comments at 6.

III. THE COMMISSION SHOULD RESOLVE SCOPE, EXPIRATION AND BAND PLAN ISSUES IN A WAY THAT MAXIMIZES THE POTENTIAL OF LMDS TO IMMEDIATELY OFFER A COMPETITIVE SUBSTITUTE FOR LOCAL EXCHANGE AND VIDEO SERVICES

The opening comments raise several issues related to the scope and duration of LMDS eligibility restrictions and the appropriate band plan for LMDS service. WebCel believes that the Commission should resolve these issues in a way that maximizes the potential for LMDS to serve as a broadband substitute for local telephone and cable services.

A. Scope of Eligibility Restrictions

Commenters supporting WebCel's call for LMDS eligibility restrictions are sharply divided in their views on the appropriate scope of a Commission rule. Some parties, citing the risk of horizontal collusion, propose restrictions against LEC and cable system bidding on LMDS in any license area, both in-region and out-of-region. SkyOptics Comments at 1. Others, without much justification, suggest that restrictions should be limited only to the largest LECs and cable MSOs, but must extend nationwide. CellularVision USA Comments at 14.

WebCel's proposal represents a moderate position. We have advocated that LECs and cable systems not be precluded from bidding for LMDS in BTAs that do not overlap their monopoly franchises, for the simple reason that the economic justification for cross-ownership restrictions hinges on the incentive of an incumbent monopolist to protect its existing market power. Although WebCel shares the concern that LECs and MSOs have an incentive for "reciprocity"—avoiding direct assault on another monopolist in order to deter retaliation—we are concerned that such a result would lack the coherent economic and policy basis demanded, by the Commission and the courts, for limitations on auction participation. A geographically limited eligibility rule, tied to the demonstrable incentive of incumbent LECs and cable operators to trade some future monopoly rents in order to extend their market power, is preferable to a nationwide restriction. If the LECs (and major MSOs) are serious about truly competing with LMDS, this approach leaves them free to do so in the 80% or more of the nation outside each of their monopoly service areas.

There is no economic or policy basis to distinguish "small" incumbents from larger RBOCs and MSOs. In each case, regardless of size, the same incentive to offer supracompetitive

auction prices exists. On the other hand, we agree with the comments of Puerto Rico Telephone Co., which urges that eligibility restrictions, if applicable, should be imposed on both cable operators and LECs. PRTC Comments at 2. Allowing only one of the two monopolists to use LMDS as a means of "intermodal" competition would produce an uneven playing field, while still retaining much of the anticompetitive potential for effective "warehousing," or less-than-optimal development, of LMDS spectrum.

The rural telephone companies argue that they should be excluded from any LMDS eligibility restrictions in order to encourage investment in this new infrastructure, suggesting that alternative bidders are unlikely in rural areas.[21] These concerns are better addressed by application of the Commission's proposed definition of "incumbent" than with a blanket exemption. As proposed in the *Fourth Notice,* a LEC would be considered an incumbent for LMDS purposes, and thus ineligible to bid on or acquire and LMDS license, if 20% or more of a BTA overlaps its franchise area. *Fourth Notice* ¶ 132. Under this approach, most rural LECs would be permitted to bid on LMDS, because few of these companies, unlike the RBOCs, GTE and major independent LECs, serve franchises covering large portions of LMDS service areas. This approach would meet the stated concern that rural telephone companies "do not serve the dense areas of BTAs." NTCA Comments at 3. It would also permit rural LECs to use LMDS to expand service beyond their existing franchise areas. AHRTG Comments at 5; RTC Comments at 5. Exempting entire

[21] The rapid build-out of cellular RSAs and the tremendous auction interest in rural PCS licenses indicates strongly that there is little reason to fear an absence of interest in LMDS licenses in rural BTAs.

classes of incumbents from application of LMDS restrictions based solely on their size or geographic location, however, is an overbroad "solution" to a problem that may never arise.[22]

B. Expiration of Eligibility Restrictions

Both CPI and MCI, which otherwise fully support WebCel's proposal for temporary, geographically limited eligibility restrictions, commented that the 1996 Act's standards for assessing local telephone and cable competition—the "competitive checklist" of Sections 251 and 271, and the "effective competition" test of Section 623—are too narrow to serve as an effective standard for expiration of LMDS restrictions. CPI Comments at 14-15; MCI Comments at 8-9. WebCel agrees in principle with these comments. As we have observed, the *Fourth Notice* is correct that "satisfaction of the checklist and other statutory criteria for RBOC entry into long-distance services is not 'a reliable indicator of the appropriate level of local exchange competition' for purposes of LMDS eligibility restrictions." WebCel Comments at 25.

At the same time, and recognizing that the competitive "checklist" does not formally apply to non-BOC LECs, WebCel believes that the benefits of an easily administered, predictable rule outweigh the utility of a standard tied more closely to the actual level of competition in local telephone markets. Our proposal to use these standards as surrogates for local competition is

[22] There is good reason not to adopt a blanket exclusion for rural LECs. Although wireline telephone network investment has lagged in rural areas, LMDS's comparatively low network and CPE costs may allow it to serve as the basis for accelerated competitive infrastructure development in rural areas. Even if the Commission were to consider a rural LEC exemption, however, WebCel strongly disagrees with Roseville Telephone Company's proposal that the Commission apply the "2% of nationwide access lines" standard from Section 251(f) of the 1996 Act. That provision, designed to allow state commissions to shield smaller LECs from the burdens of interconnection and unbundling in the absence of bona fide requests, or if these steps are technically infeasible or economically burdensome, is not an appropriate surrogate for the "non-dense" BTAs the rural LECs believe are unlikely to attract LMDS bidders. For instance, under the 2% standard, LECs as large as Southern New England Telephone Company, which serves virtually all of Connecticut, would be allowed to bid on LMDS licenses throughout their service territories.

made purely for administrative simplicity and convenience. Although a more refined antitrust analysis, using the principles of the DOJ/FTC Merger Guidelines, would better measure the actual development of local telephone and video competition, it would necessitate repeated regulatory proceedings and would lack the certainty of a more "concrete" test that the Commission will already be applying to LECs and cable operators. Finally, given the importance of eligibility restrictions as a short-run measure to promote facilities-based competition, with wireless technology, while landline networks are being constructed, WebCel believes that there is a relatively small "downside" to using these 1996 Act surrogates. Since LECs and cable operators will be precluded from bidding for LMDS licenses, the anti-trafficking restrictions traditionally applied by the Commission to new licensees should be sufficient to prevent after-auction, anticompetitive acquisitions of LMDS competitors.

C. The LMDS Band Plan

The commenters (including LECs) unanimously endorsed the Commission's tentative conclusion to allocate an additional 300 MHz of spectrum to LMDS. WebCel concurs in this assessment. It is particularly vital that the Commission set aside the additional 300 MHz because the 150 MHz block has been limited to downstream (hub-to-sub) communications. Therefore, broadband LMDS applications, which are anticipated to be two-way and increasingly symmetric, will require the extra capacity proposed in the 31 GHz band for upstream functionalities.

We caution, however, that the Commission must auction all LMDS spectrum as a single license, and even at this late date should endeavor to work with other government spectrum holders, such as NASA, to create a single 1.3 GHz LMDS license in two roughly equal blocks using spectrum below 27.5 GHz in order to achieve broadband upstream and downstream capa-

bilities. WebCel Comments at 25-26. The promise of LMDS is its significant broadband potential, a throughput capacity that dwarfs all other wireless services. As Texas Instruments observed, the Commission has already reduced the LMDS allocation in this proceeding from its initial proposed size of 2 GHz. TI Comments at 4-5. Further reductions, or wide separation in LMDS spectrum blocks, will only delay the development of cost-effective network equipment and CPE, and limit the ability of LMDS providers to offer very high bandwidth services. In making its band plan determinations, the Commission plays the role not only of spectrum auctioneer, but also as "product developer," because spectrum decisions have a direct effect on the services (and underlying cost structures) that can be offered via LMDS.

In this light, the Wireless Cable Association's proposal that the FCC separately auction the 28 GHz and 31 GHz blocks must be rejected. WCA Comments at 3-5. WCA argues that some of its members, who already hold choice spectrum, may only want to "bid upon and acquire authorizations for less than all of the available bandwidth." *Id.* at 4. That is precisely the problem. If the Commission allows LMDS to be auctioned in pieces, parties who value the resource as an ancillary midband offering (with a separate initial cost structure) to existing MMDS and ITFS services will have a greater incentive to acquire licenses, with no interest in pursuing the Commission's recognition that "LMDS is uniquely positioned to provide competitive telecommunications services and video programming delivery because of its large potential for two-way broadband capabilities."[23] While WCA suggests that disaggregation is costly, after-market *reaggregation* of individual pieces of LMDS spectrum, in an effort to reassemble the complete

[23] *Fourth Notice* ¶ 125.

1.3 GHz broadband capability, would be administratively expensive, and in all likelihood impossible to achieve a broadband offering for the nation in the near term.[24] *See* CellularVision USA Comments at 10.

CONCLUSION

Eligibility restrictions barring LECs and cable operators from bidding for, or acquiring, LMDS licensees within their service areas should be imposed until these incumbents face effective competition for their core monopoly services. These restrictions are in the public interest and are necessary to meet the clear national policy objective of facilitating effective competition for local telephone and video programming services.

Respectfully submitted,

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[24] Disaggregation would also address the concerns of the rural LECs. *See* AHRTG Comments at 7.